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# McIntosh Mirror, Door & Glass, Inc. and Glaziers, Architectural Metal and Glassworkers, Local 188. Cases 19–CA–065627 and 19–CA–066747

September 26, 2012

#### **DECISION AND ORDER**

# BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file an answer to the consolidated complaint. Upon charges and an amended charge filed by Glaziers, Architectural Metal and Glassworkers, Local 188 (the Union) on September 23, October 14, and November 28, 2011, respectively, the Acting General Counsel issued an order consolidating cases, consolidated complaint and notice of hearing (the consolidated complaint) on January 31, 2012, against McIntosh Mirror, Door & Glass, Inc. (the Respondent), alleging that it violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On May 11, 2012, the Acting General Counsel filed a Motion for Default Judgment with the Board. Thereafter, on May 15, 2012, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 4, 2012, the Board issued a revised Notice to Show Cause to two additional Respondent addresses. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

## Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the consolidated complaint affirmatively stated that unless an answer was received by February 14, 2012, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by letter dated March 13, 2012, notified the Respondent that unless an answer was received by March 20, 2012, a motion for default judgment would be filed.<sup>1</sup>

In the absence of good cause being shown for the failure to file an answer to the consolidated complaint, we deem the allegations in the consolidated complaint to be admitted as true, and we grant the Acting General Counsel's Motion for Default Judgment.

On the entire record, the Board makes the following

#### FINDINGS OF FACT

#### I. JURISDICTION

At all material times, the Respondent has been a State of Washington corporation with an office and place of business in Seattle, Washington (the facility) and has been engaged in the production, installation and servicing of architectural metal work and glazing.

In conducting its operations during the 12-month period ending October 7, 2011, the Respondent performed services valued in excess of \$50,000 in states other than the State of Washington.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

At all material times, Western Washington Glass Contractors Multi-Employer Group (the Association), has been an organization composed of various employers in the glazing industry, one purpose of which is to represent its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

At all material times, the Respondent has been an employer-member of the Association, and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with the Union.

fied mail, but that it was returned by the Postal Service on March 16, 2012, marked as "unclaimed," with a new address provided. On that same date, the complaint was resent by certified mail to the Respondent at its new address; however, it was again returned as "unclaimed." The March 13, 2012 letter referenced above was sent to the Respondent by regular mail and email. The email was rejected as "undeliverable"; there is no indication in the Acting General Counsel's motion that the letter sent by regular mail was returned. On March 30, 2012, the Acting General Counsel sent another letter to the Respondent by regular mail at its new mailing address, enclosing the March 13, 2012 letter, and providing the Respondent additional time to file an answer. Again, there is no indication that this mail was returned.

It is well settled that a respondent's failure or refusal to accept certified mail or to provide for receiving appropriate service cannot serve to defeat the purposes of the Act. See, e.g., *I.C.E. Electric, Inc.*, 339 NLRB 247, 247 fn. 2 (2003), and cases cited therein. In addition, the failure of the Postal Service to return documents served by regular mail indicates actual receipt of those documents by the Respondent. Id.; *Lite Flight, Inc.*, 285 NLRB 649, 650 (1987), enfd. 843 F.2d 1392 (6th Cir. 1988).

<sup>&</sup>lt;sup>1</sup> The Acting General Counsel's motion and attached exhibits show that the consolidated complaint was served on the Respondent by certi-

#### II. ALLEGED UNFAIR LABOR PRACTICES

1. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

David McIntosh - President and Owner
Tom McIntosh - Vice President

- 2. About August 6, 2009, the Association and the Union entered into a collective-bargaining agreement (the Association Agreement), effective from July 1, 2009 through June 30, 2012.
- 3. Since at least August 6, 2009, the Respondent has been bound to the Association Agreement.
- 4. The employees of the Respondent, as described in the Association Agreement (the unit), constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.<sup>2</sup>
- 5. At all material times, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.
- 6. Article 18 (Trust Funds) of the Association Agreement contains provisions describing the Respondent's obligation to make monthly contributions to employee Trust Funds, specifically the Glaziers Retirement Trust Fund and District Council 5 Apprenticeship Training Trust.
- 7. Article 3 (Union Security) of the Association Agreement contains a union-security clause describing the Respondent's obligation to transmit employees' working dues to the Union.
- 8. "Schedule A" of the Association Agreement contains market recovery and Union organizational fund assessments deducted and remitted to the parties' third-party administrator for eventual transfer to the Union.
- 9. Since about March 23, 2011, the Respondent failed and refused to:
- (a) make monthly contributions to Trust Funds as described in paragraph 6;
- (b) transmit working dues to the Union as described in paragraph 7; and
- (c) remit market recovery and Union organizational fund assessments as described in paragraph 8.
- <sup>2</sup> There is no specific unit description set forth in the complaint. However, in light of the Respondent's failure to file an answer, there is no dispute that the unit described in the Association Agreement is appropriate.

- 10. The subjects set forth in paragraphs 6 through 9 relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects for the purpose of collective bargaining.
- 11. The Respondent engaged in the conduct described above in paragraph 9 without prior notice to the Union and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct and without first bargaining with the Union to a goodfaith impasse.
- 12. About October 7, 2011, the Respondent closed its facility and terminated the employment of all the employees in the unit.
- 13. The effects of the subject set forth in paragraph 12 relate to wages, hours, and other terms and conditions of employment of the unit and are a mandatory subject for purposes of collective bargaining.
- 14. The Respondent engaged in the conduct described in paragraph 12 without affording the Union an opportunity to bargain over the effects of its decision to close the facility.
- 15. About August 10, 2011, the Union requested, in writing, that the Respondent furnish it with the following information:
- (a) all payroll records starting November 1, 2008, through the most current pay period; and
- (b) individual pay stubs for all employees who are now or were members of the Union starting with the week ending inclusive of November 1, 2008, through the most current pay period.<sup>3</sup>
- 16. The information requested by the Union is necessary for, and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit.
- 17. Since about August 10, 2011, the Respondent has failed and refused to furnish the Union with the information requested by it.

# CONCLUSIONS OF LAW

- 1. By the conduct described above in paragraphs 9, 11, 14, and 17, the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees within the meaning of Section 8(d) of the Act, in violation of Section 8(a)(5) and (1) of the Act.
- 2. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

<sup>&</sup>lt;sup>3</sup> This language tracks the wording of the request as set forth in the consolidated complaint, as no copy of the letter from the Union to the Respondent was included with the motion.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, to remedy the Respondent's unlawful failure and refusal to bargain with the Union about the effects of its decision to close its facility on October 7, 2011, we shall order the Respondent to bargain with the Union, on request, about the effects of that decision. As a result of the Respondent's unlawful conduct, however, the unit employees have been denied an opportunity to bargain through their collective-bargaining representative at a time when the Respondent might still have been in need of their services and a measure of balanced bargaining power existed. Meaningful bargaining cannot be assured until some measure of economic strength is restored to the Union. A bargaining order alone, therefore, cannot serve as an adequate remedy for the unfair labor practices committed.

Accordingly, we deem it necessary, in order to ensure that meaningful bargaining occurs and to effectuate the policies of the Act, to accompany our bargaining order with a limited backpay requirement designed both to make whole the unit employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the Respondent. We shall do so by ordering the Respondent to pay backpay to the unit employees in a manner similar to that required in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), as clarified by *Melody Toyota*, 325 NLRB 846 (1998).<sup>4</sup>

Thus, the Respondent shall pay its unit employees backpay at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Decision and Order until the occurrence of the earliest of the following conditions: (1) the date the Respondent bargains to agreement with the Union on those subjects pertaining to the effects of its decision to close its Seattle, Washington facility on the unit employees; (2) a bona fide impasse in bargaining; (3) the Union's failure to request bargaining within 5 business days after receipt of this Decision and Order, or to commence negotiations within 5 business days after receipt of the Respondent's notice of its desire to bargain with the Union; or (4) the Union's subsequent failure to bargain in good faith.

In no event shall the sum paid to these employees exceed the amount they would have earned as wages from

the date on which the Respondent ceased its operations to the time they secured equivalent employment elsewhere, or the date on which the Respondent shall have offered to bargain in good faith, whichever occurs sooner. However, in no event shall this sum be less than the employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ. Backpay shall be based on earnings which the unit employees would normally have received during the applicable period, less any net interim earnings, and shall be computed in accordance with F. W. Woolworth Co., 90 NLRB 289 (1950), with interest at the rate prescribed in New Horizons for the Retarded, 283 NLRB 1173 (1987), compounded daily as prescribed in Kentucky River Medical Center, 356 NLRB No. 8 (2010).

Additionally, having found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing, since March 23, 2011, to make monthly contributions required by Article 18 (Trust Funds) of the Association Agreement, specifically the Glaziers Retirement Trust Fund and District Council 5 Apprenticeship Training Trust, we shall order the Respondent to make all such delinquent Trust Fund contributions, including any additional amounts due the funds in accordance with Merryweather Optical Co., 240 NLRB 1213, 1216 fn. 7 (1979). We shall also order the Respondent to reimburse the unit employees for any expenses ensuing from its failure to remit the required contributions, as set forth in Kraft Plumbing & Heating, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in Ogle Protection Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in New Horizons for the Retarded, supra, compounded daily as prescribed in Kentucky River Medical Center, supra. 5

Also, having found that the Respondent violated Section 8(a)(5) and (1) by failing to transmit employees' working dues to the Union as required by Article 3 (Union Security) of the Association Agreement, and failing and refusing to remit market recovery and Union organizational fund assessments as required by Schedule A of the Association Agreement, we shall order the Respondent to remit to the Union the working dues deducted pursuant to valid checkoff authorizations and remit market recovery and Union organizational fund assessments

<sup>&</sup>lt;sup>4</sup> See also, Live Oak Skilled Care & Manor, 300 NLRB 1040 (1990).

<sup>&</sup>lt;sup>5</sup> To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions to the funds during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to any amount that the Respondent otherwise owes the funds.

on behalf of unit employees to the parties' third-party administrator for eventual transfer to the Union that have not been remitted since about March 23, 2011, with interest as prescribed in *New Horizons for the Retarded*, supra.

Having found that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to furnish the Union with relevant and necessary information requested on August 10, 2011, we shall order the Respondent to provide the Union with the requested information.

Finally, in view of the fact that the Respondent's facility in Seattle, Washington, is closed, we shall order the Respondent to mail a copy of the attached notice to the Union and to the last known addresses of its former unit employees who were employed at any time since March 23, 2011, in order to inform them of the outcome of this proceeding.

#### **ORDER**

The National Labor Relations Board orders that the Respondent, McIntosh Mirror, Door & Glass, Inc., Seattle, Washington, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to bargain collectively and in good faith with Glaziers, Architectural Metal and Glassworkers, Local 188, as the exclusive collective-bargaining representative of its unit employees over the effects of the Respondent's decision to close its Seattle, Washington facility and terminate the employment of all the unit employees on about October 7, 2011. The unit is comprised of those employees of the Respondent as described in the collective-bargaining agreement (the Association Agreement) between the Union and the Western Washington Glass Contractors Multi-Employer Group (the Association), of which the Respondent is an employer-member.
- (b) Failing to make monthly contributions to the employee Trust Funds, specifically the Glaziers Retirement Trust Fund and District Council 5 Apprenticeship Training Trust; as required by Article 18 of the Association Agreement.
- (c) Failing to transmit dues to the Union as required by Article 3 (Union Security) of the Association Agreement, and failing to remit market recovery and union organizational fund assessments to the parties' third-party administrator for eventual transfer to the Union, as required by Schedule A of the Association Agreement.
- (d) Failing to furnish the Union with requested information that is necessary for and relevant to the performance of its duties as the exclusive collective-bargaining representative of the employees in the unit.

- (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain collectively and in good faith with the Union over the effects of the Respondent's decision to close its Seattle, Washington facility and to terminate the employment of all of the unit employees on about October 7, 2011, and reduce to writing and sign any agreement reached as a result of such bargaining.
- (b) Pay the unit employees their normal wages for the period set forth in the remedy section of this decision, and in the manner set forth in the remedy section of this decision.
- (c) Make all contributions as required by Article 18 (Trust Funds) of the Association Agreement, specifically the Glaziers Retirement Trust Fund and District Council 5 Apprenticeship Training Trust, that have not been made since March 23, 2011, in the manner set forth in the remedy section of this decision.
- (d) Remit to the Union all dues as required by Article 3 (Union Security) of the Association Agreement that have been deducted pursuant to valid checkoff authorizations, that have not been remitted since March 23, 2011, in the manner set forth in the remedy section of this decision.
- (e) Remit to the parties' third-party administrator all market recovery and Union organizational fund assessments, for eventual transfer to the Union, as required by Schedule A of the Association Agreement, that have not been remitted since March 23, 2011, in the manner set forth in the remedy section of this decision.
- (f) Make whole the unit employees for any expenses ensuing from the Respondent's failure to make contributions to the funds as required by the Association Agreement, since March 23, 2011, in the manner set forth in the remedy section of this decision.
- (g) Provide to the Union the information it requested on August 10, 2011.
- (h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (i) Within 14 days after service by the Region, duplicate and mail, at its own expense and after being signed by the Respondent's authorized representative, copies of

the attached notice marked "Appendix" to the Union and to all unit employees who were employed by the Respondent at any time since March 23, 2011. In addition to physical mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 26, 2012

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

# (SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
MAILED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to mail and obey this notice.

## FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively and in good faith with Glaziers, Architectural Metal and Glassworkers, Local 188, as the exclusive collectivebargaining representative of our unit employees over the effects of our decision to close our Seattle, Washington facility and terminate our unit employees on about October 7, 2011. The unit is comprised of our employees as described in the collective-bargaining agreement (the Association Agreement) between the Union and the Western Washington Glass Contractors Multi-Employer Group (the Association), of which we are an employer-member.

WE WILL NOT fail to make contributions as required by Article 18 (Trust Funds) of the Association Agreement, specifically the Glaziers Retirement Trust Fund and District Council 5 Apprenticeship Training Trust.

WE WILL NOT fail to transmit dues to the Union as required by article 3 (Union Security) of the Association Agreement and fail to remit market recovery and organizational fund assessments to the parties' third-party administrator, for eventual transfer to the Union, as required by Schedule A of the Association Agreement.

WE WILL NOT fail and refuse to furnish the Union with requested information that is necessary for and relevant to the performance of its duties as the exclusive bargaining representative of the employees in the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain collectively and in good faith with the Union over the effects of our decision to close our Seattle, Washington facility and terminate our unit employees on about October 7, 2011, and reduce to writing and sign any agreement reached as a result of such bargaining.

WE WILL pay the unit employees their normal wages for the period set forth in the Decision and Order of the National Labor Relations Board, plus interest.

WE WILL make all contributions as required by Article 18 (Trust Funds) of the Association Agreement, specifically the Glaziers Retirement Trust Fund and District Council 5 Apprenticeship Training Trust, that have not been made since March 23, 2011, plus interest.

WE WILL remit to the Union all dues as required by Article 3 (Union Security) of the Association Agreement that have been deducted pursuant to valid checkoff authorizations, that have not been remitted since March 23, 2011, plus interest.

WE WILL remit to the parties' third-party administrator all market recovery and Union organizational fund assessments, for eventual transfer to the Union, as required by Schedule A of the Association Agreement that have not been remitted since March 23, 2011, plus interest.

WE WILL make whole our unit employees for any expenses ensuing from our failure to make the contribu-

<sup>&</sup>lt;sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tions to the funds as required by the Association Agreement, since March 23, 2011, plus interest.

WE WILL provide the Union with the information it requested on August 10, 2011.

MCINTOSH MIRROR, DOOR & GLASS, INC.